**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.17 OF 2000**

1. Kailash Upendra Giri,
   C-10838.

2. Damodar Laxmidhar Sahu,
   C-10839.

....Appellants.

Vs.

The State of Maharashtra.

....Respondent.

Mr. Rahul Thakur for the appellants.

Mrs. Usha Kejriwal, APP for the respondent.

.....

**CORAM : R.M. LODHA AND**
**R.S. MOHITE, JJ.**

**DATED :31ST JANUARY,2005.**

**ORAL JUDGMENT: ( PER R.S. MOHITE, J.)**

1. This is an appeal filed by the original accused Nos. 1 and 2 in Sessions Case No.766 of 1996 impugning the judgment and order passed by the Additional Sessions Judge, Greater Bombay on 17.8.1999 in the said case, convicting these accused of offences punishable under Section 449, 450, 302

read with 34, 394 and 397 of the Indian Penal Code. For the offence under Section 449 they have been sentenced to suffer R.I. for 3-years. For the offence under section 450 they are sentenced to suffer R.I. for 2-years. For the offence under section 302 read with 34 of the Indian Penal Code they are sentenced to suffer R.I. for life and to pay a fine of Rs.5000/-each in default to suffer R.I. for 1-year. For the offence under Section 394 they are sentenced to suffer R.I. for 5-years and to pay a fine of Rs.2000/- in default to suffer R.I. for 6-months. For the offence under Section-397 they are sentenced to suffer R.I. for 7-years. It has been directed that all the substantive sentences are to run concurrently.

2. The brief facts of the prosecution case are as under:

a) Deceased Suresh Wagh was residing with his wife Usha Wagh in Block No.401 situated on the 4th floor of B-Wing in a building named as "Udyan Darshan", Opposite Ravindra Natya Mandir, Mumbai. They have two daughters one by name Kalpana and other by name Manisha. Manisha was settled in London and she was practicing as a Medical

Practitioner there. Dr. Usha was an Anaesthesia Consultant and used to work in various hospitals. Deceased Dr. Suresh Wagh was a Neuro Surgeon attached to the Bombay Hospital. He had worked in that hospital for about 19 years. In 1992, he suffered his first Paralysis attack and in 1993 he suffered a second similar attack and as a result of these two attacks he became bed ridden.

b) In or about November or December 1995, Usha had kept a boy by name Purshottam who was aged about 12 to 13 years for doing household work. This boy had been introduced to Usha by one Ramji who used to work in Flat No.105 situated in A wing of the society. Ramji was from Orissa. Before Purshottam, Ramji had introduced the brother of Purshottam by name Kailas to Usha and Kailas had worked there for 2 to 3 months. After 2 to 3 months Kailas got another job in the house of one Nasli Wadia and hence, Kailas had sent his brother Purshottam through Ramji for doing household work. Purshottam used to work through out the day and at night he used to sleep in the kitchen of the house.

c) On 3.5.1996, at about 7.45a.m. Usha had a cup of tea alongwith her husband Suresh. The tea

was prepared by servant Purshottam. Thereafter, Usha left for Jaslok Hospital as she had to attend a Seminar and she took her driver alongwith her. Her husband Suresh and Purshottam were left alone at home. After completion of the Seminar, Usha returned home at about 4.00p.m. On returning she found that the inner door of the house was open and outer door was closed. She noticed the above fact from the grill. With the key available with her, she opened the outer door and she heard barking of her dog from the room situated at the right side. When she opened the door, she did not notice Purshottam and she thought that he must have gone out. She then went to the bed room and found that out of the two mattress one had been over turned. She did not immediately see her husband in the bedroom but she noticed that his walker was near the place on the side where he used to sleep. On bending she noticed the leg of her husband under the mattress and when she lifted the mattress, she found that her husband had been strangulated by a cloth kitchen towel which she had given to Purshottam. The blood was oozing from his nose and ears. His hands and legs had been tied with the saree of Usha. She found that the wooden cupboard in her bed room had been forcefully opened by a screw driver and

that ornaments and cash of approximately Rs.1,00,000/- kept therein had been stolen. Usha started to search for Purshottam but he could not be found. She then tried to search Ramji but he also could not be found. She tried to search for Kailash but he also found missing. She then suspected that all these persons must have been responsible for the murder of her husband and for the theft of the ornaments and money. She therefore contacted Dadar Police Station and her First Information Report was recorded by Dadar Police Station. On her information P.W.No.18 P.I. Madhav Shivaji Surve who was attached to Dadar Police Station proceeded to the spot. He immediately recorded the statement of Dr. Usha Wagh in the flat itself. It may be stated here that by the time when the matter reached trial Dr. Usha Wagh had expired therefore, her First Information Report was proved by the prosecution through the evidence of P.W.No.18 P.I. Madhav Surve.

d) P.W.No.18 Madhav Surve then returned to the police station and registered crime C.R.No.128/1996. He prepared a panchanama (Exh.30) of the scene of offence and the condition of the body of the deceased. He called the photographer

and took photographs of the deceased at the place of incident. He then directed P.S.I. Pilkar to send the dead body alongwith ADR form to the Coroner's court. He then called a Finger print expert to examine the articles and P.S.I. Pilkar prepared a panchanama (Exh.43). He then returned to the police station. P.I. Surve then tried to search Ramji and Kailash. On the same day in the night they found Ramji and his statement was recorded. It was found that Ramji was working as Peon in the Guest house of the company which was situated in the same building. Ramji disclosed that Kailash had a friend by name Damodar and Damodar was working in a company known as Jalan and Company at Girgaon. On enquiry with Jalan and Company, it was learnt that Damodar had been working in the said company on that day and on the same day he had left service of the company to go to Calcutta on the same night. It was learnt that Damodar had his native place at Orissa and was presently working at Calcutta. P.I. Surve prepared two teams to proceed to Orissa and Calcutta for search of Damodar. On 4.5.1996, P.S.I. Surve recorded the supplementary statement of the complainant Dr. Usha Wagh wherein she gave the description of the missing ornaments and the particulars of the cash amount. He recorded the

statement of Prashant Nari who was driver of Dr. Wagh. On 6.5.1996 he recorded the statement of Jyoti Surve and Dinar Patil. On 10.5.1995 he recorded a statement of Sabastin Rodrigues who had snapped the photographs at the place of incident. On 13.5.1996, he recorded a supplementary statement of Sabastin Rodrigues after he produced the photographs and negatives. In the mean while a police team headed by P.W.No.8 P.S.I. Nandkumar Ghorpade had proceeded to Village Harekrishnapur District-Bhaleshwar in Orissa State. P.S.I. Ghorpade had taken one Ramesh Behra who was also from the said area to find out the accused. Another team which also consisted of one constable had left Mumbai on 6.5.1996. They reached Bhaleshwar and learnt that Village Harekrishnapur fell within the jurisdiction of Sourav Police Station. They reached the said police station on 7.5.1996 at 4.30p.m. The other police team headed by one A.P.I. Patil also reached the same police station from Calcutta and A.P.I. Patil had brought one Surendra Choudhary from Mumbai to identify the accused. He had also brought one Praful Sahu who was a relative of the suspected accused. Alongwith one P.S.I. Mohanti from Sourav Police Station they reached Village Harekrishnapur on the midnight between 6.5.1996 and

7.5.1996. Praful Sahu then pointed out the house of suspected accused No.1 Kailash. They went inside the house of accused Kailash and found Kailash Giri who was identified by Praful Sahu. On being accosted Kailash admitted to have committed the murder and further agreed to produce whatever goods he had. Accordingly, P.W.5 Surendra Choudhary and Ramesh Bahera who had accompanied the police parties were asked to act as a panchas and in their presence Kailash took out cash amount of Rs.6000/- from the pocket of his trouser. He had also removed a silver chain from his neck and both these articles were seized under a panchanama. Kailash then showed them another boy and told the police team that he was Purshottam. Purshottam agreed to produce whatever he had brought from the house of Dr. Wagh. Thereupon Purshottam took out cash amount of Rs.500/- and a bunch of keys from his pocket and these were seized under a separate panchanama.

e) Thereafter, the Police party, Kailash and Purshottam came out of the house. Praful Sahu then took the police team to another house and informed them that the suspected accused Damodar was residing in the said house. At that time the police team saw two boys standing outside the house and on seeing

the police personnel, they started running away. On enquiry, it was found that one of those boys was accused No.3 Damodar Sahu. Damodar was cought and he agreed to produce whatever he had brought from the house of Dr. Wagh. He then went near a german silver utensil (Handa) and took out cash amount of Rs.61,000/- and produced the same. From the search of clothes of Damodar, three railway tickets were found in the trouser of Damodar. The said cash amount and railway tickets were seized from the Damodar under panchanama. The other boy was found to be Sridhar Sahu. Sridhar took out a wrist watch from his wrist and informed the police that he had brought the wrist watch from the house of Dr. Wagh. The wrist watch was also seized from Sridhar under panchanama. Two police team then returned back to Mumbai.

f) On 10.5.1996 P.W.No.18 P.I. Madhav Surve called Dr. Usha Wagh and opened the seized property in her presence. The said property was identified by Dr. Usha Wagh. He then recorded a supplementary statement of Dr. Usha Wagh.

g) On 13.5.1996 upon interrogation of the accused, P.S.I. Surve learnt that the duplicate

keys of the flat had been prepared at Dadar. The accused No.1 Kailash pointed out the said person who had prepared the duplicate keys to the house of Dr. Wagh and the statement of the said key maker Anand Katappa was recorded.

h) On 19.5.1996 P.W.18 P.I. Madhav Surve referred the accused Kailash, Damodar and Sridhar for identification. Two witnesses were put up in the identification parade being P.W.No.4 Dubhali Raghunath Dubey who was the watchman of the society and P.W.No.3 Sunil Bachnuprasad Verma who was a colleague of accused No.2 Damodar in the company where they used to work. During further investigation, accused Purshottam was found to be a juvenile and therefore his case was separated. Ultimately after completion of investigation, the charge-sheet came to be filed.

3. At the stage of the trial the prosecution examined as many as 23-witnesses. Several documents were produced by the prosecution in support of its case. The statements of the three accused came to be recorded under Section 313 of the Criminal Procedure Code.

4. After hearing both the sides, ultimately the Trial Court was pleased to acquit the accused No.3 Sridhar but convicted the accused Nos 1 and 2 as stated hereinabove.

5. We have heard both the sides at length and perused the entire record. This is a case of circumstantial evidence. However as the complainant Dr. Usha Wagh had expired prior to the commencement of the trial, her evidence was not available. The circumstances relied upon by the prosecution are as follows:

i) That Kailash was the person who was earlier working as a servant in the house of Dr. Wagh and he was therefore familiar with the places where valuables were kept and the situation of the occupants of the house.

ii) As against accused No.1 Kailash the fact that within three days after the incident cash amount of Rs.6000/- (with one note bearing the name of doctor in the handwriting of Dr. Usha Wagh which was identified by P.W.No.9 Kalpana Vaidya who is the daughter of Dr. Wagh.) and a silver chain ( also identified by P.W No.9 Kalpana Vaidya), were

recovered.

iii) The finger prints of Kailash were found on a vessel in the house (in the kitchen).

iv) The fact that Kailash was present and seen on the date of the incident and had immediately absconded and had run away to his native place on the date of the incident.

v) The fact that accused No.1 Kailash got prepared a duplicate set of keys to the house of Dr. Wagh from P.W.No.14 Anand Katappa and the fact that Anand Katappa identified Kailash as the person who had prepared the duplicate key set from him.

6. The circumstances against the accused No.2 Damodar are as follows:

i) The fact that Damodar was seen in Mumbai on 3.5.1996 i.e. on the date of the incident but absconded and ran away to his native place on the same day.

ii) The fact that an amount of Rs.61,000/- and four railway tickets were recovered from the pocket

of the trouser of Damodar coupled with a fact that one of those notes bare the name of a doctor who had given the amount to Dr. Usha Wagh, in her handwriting which was identified by P.W.9 Kalpana.

iii) The fact that accused No.2 Damodar was seen with accused No.1 Kailash by P.W.No.3 Sunil Bachnuprasad Verma on the date of the incident.

7. We now proceed to examine the circumstances against the accused No.1 Kailash.

8. As regards the first circumstance of Kailash being an earlier servant in the house and being familiar with the house as well as its occupants, we have the evidence of P.W.9 Dr. Kalpana Vaidya. She states in her evidence that Kailash was working in the house of her mother for 6 to 7 months. That whenever she used to visit the house of her mother she used to see Kailash in the house. That her mother had once told her that Kailash had got another job and that he had brought Purshottam as a substitute but Kailash was also visiting the house and watching television. This evidence conclusively proves the circumstance about Kailash being familiar with the house of Dr. Wagh

and its occupants.

9. As regards the second circumstance i.e. recovery of Rs.6000/- in cash and one silver chain, the prosecution had led the evidence of P.W.No.8 P.S.I. Nandkumar Ghorpade who talks about the said recovery. In addition, the prosecution has also examined P.W.5 Surendra Choudhary who was the panch in respect of the recovery panchanama. The Advocate appearing for accused No.1 pointed out some discrepancies in the evidence of P.W.8 P.S.I. Nandkumar Ghorpade and P.W.5 Surendra Choudhary. According to him, while P.S.I. Nandkumar Ghorpade had talked about the recovery of a silver chain from the neck of Kailash the panch witness had not talked about recovery of the silver chain from the neck of the accused. There is hardly any substance in his argument. P.W.9 Kalpana Vaidya in her evidence has identified the silver chain recovered (Part of Article-8), as the chain belonging to her father. In so far as recovery of an amount of Rs.6000/- Kalpana stated that she had seen her mother writing names of the doctor on the currency notes received and she also identified the handwriting of her mother on one currency note ( Part of Article 8 before the court). This circumstance of recovery is

therefore clearly established as against the accused Kailash. In his statement under Section 313 of the Criminal Procedure Code, Kailash has given no explanation about the finding of Rs.6000/- and silver chain and has confined himself merely to denying the recovery. This circumstance is also duly proved by the prosecution against Kailash.

10. The next circumstance relating to finger prints of Kailash is proved by the prosecution by examining P.W.No.22 Mr.Amol Nominath Athanikar who was photographer working in the office of the Commissioner of Police Mumbai. This witness deposed that from the scene of offence photographed two finger prints on the glass and two finger prints on the steel pot. He thereafter prepared enlarged photographs and delivered the negatives and positives to the police. The prosecution then further examined P.W.19 Chandrakant Ghag who was the panch witness for the panchanama relating to the lifting of the finger prints at the scene of offence and this witness formally proved the panchanama. The prosecution then finally examined P.W.23-Vinayak Palav who was the Finger print expert and this witness in his evidence stated that he found the finger prints on the steel pot at the scene of the

offence. He spread mercury and chalk which is known as white powder and lifted those prints. That on 26.6.1996 Dadar Police Station took various finger prints of the suspected accused persons by name Kailash, Bhupendra, Sridhar and Damodar. He had stated that upon examination he found that the finger prints of the accused Kailash were similar to the finger prints which he had collected from the steel utensil. As per the office procedure he circulated this finding to 14-finger print experts and 12 experts scrutinized his report and confirmed his finding. Out of these 13 experts, 8 were Senior experts and others were Junior experts. There is virtually no cross examination of this witness and therefore, his evidence is totally acceptable.

11) The next circumstance is that Kailash was present and seen in Mumbai on the date of the incident and immediately absconded and ran away to his native place is proved by the prosecution through the evidence of P.W.3 Sunil Bachanuprasad Verma. This witness states that he was working alongwith accused No.3 Damodar Sahu in Jalan and Company. He states that on 3.5.1996 Damodar came to collect some articles like stove, utensils and cooker from his room. When he and Damodar came out

of the office of his company, he saw one Kailash was sitting outside . He identified Kailash in the court and stated that Damodar told him that within 2 to 4 days they will be going to Calcutta and thereafter, Damodar and Kailash went back. The evidence of this witness is corroborated by the fact that this witness had identified Kailash in an identification parade which was held by the Special Executive Magistrate. A further fact that Kailash was found missing and had ran away to his village is corroborated by the recovery evidence which indicates that on 7.5.1996 Kailash was actually found in his village. This circumstance is also proved by the prosecution.

12) The last circumstances against Kailash is the fact that he went to a key maker to prepare the duplicate keys of the flat of Dr. Wagh. This circumstance is proved by the prosecution by the evidence of P.W.14 Anand Katappa. This witness states that he is a key maker and doing the business of preparing duplicate keys. In the month of March,1996 one boy had come to his place and he had prepared three duplicate keys at his instance. That, thereafter, about two months later the policemen had brought the elder boy who had earlier

got prepared three duplicate keys. He identified accused Kailash in the court by pointing out Kailash amongst the other accused. There is absolutely no cross examination of this witness except to suggest that the shape of all the keys was different. This circumstance is also proved by the prosecution against Kailash.

13) As the result, we find no infirmity in the conviction and sentence awarded to accused Kailash and the said conviction is liable to be confirmed.

14) That brings us now to the evidence against the accused No.2 Damodar.

15) The first circumstance against the Damodar is that he was seen in Mumbai on the date of the incident i.e. on 3.5.1996 but absconded and ran away on the same day. The prosecution sought to prove this circumstance through the evidence of P.W.3 Sunil Bachnuprasad Verma who was a co worker of Damodar. No doubt, this witness had talked about seeing of Damodar on 3.5.1996 when Damodar came to him to demand his articles like stove, utensils and cookers lying in his room. He states that he told Damodar that Pankaj Kumar Jalani who was the owner

of his company was not present and he may come at 2.00p.m. so he asked him to come at 2.00p.m. He then came alongwith Damodar outside the company. Normally speaking, this evidence would be sufficient to prove the aforesaid circumstance but surprisingly this witness has failed to identify his co worker Damodar in the identification parade and this fact is confirmed by the Special Executive Magistrate and therefore, we would not like to rely upon this circumstance.

19) The next circumstance is about the fact of recovery of amount of Rs.61,000/- in cash and four railway tickets, two bearing dates 3.5.1996 and the other two bearing date 4.5.1996 from this accused, the Advocate for accused No.2 pointed out to us that there is some discrepancy in the evidence of P.W.8 P.S.I. Nandkumar Ghorpade and P.W.5 Surendra Choudhary who was recovery panch as regards the seizure of cash amount from Damodar whereas P.W.8 P.S.I. Nandkumar Ghorpade had stated in his evidence that an amount of Rs.61,000/- was recovered from a german silver utensil (Handa) and four railway tickets were also recovered from the pocket of the trouser of Damodar. P.W.5 Surendra Choudhary had stated that an amount of Rs.60,000/- was found

in a brass metal like drum at the instance of Damodar. He pointed out that the panch had also stated nothing about the recovery of railway tickets at the behest of Damodar. It is further proved that one of the note (Article 10) had a name of one doctor written in the handwriting of Dr. Wagh which was identified by P.W.9 Kalpana Vaidya but all this recovery evidence at the highest even after drawing upon Section 114(a) of the Indian Evidence Act, cannot eliminate the possibility that the accused may only have been a receiver of the stolen goods. For establishing the fact that accused was himself one of the robbers, some other circumstance connecting him with the scene of the crime would have to be established. This is an element missing in this case and is the distinguishing factor on facts in the two cases cited by the prosecution i.e. **State of Karnataka Vs. David Rozario and another reported in 2002 Supreme Court Cases (Cri.)1852 and Gulab Chand Vs. State of M.P. reported in (1995) 3 Supreme Court Cases 574.** In the case of State of Karnataka Vs. David Rozario (supra), bloodstained weapons were also recovered at the behest of the accused and the blood group found of those weapons matched the blood of the deceased found on her shawl at the place of the offence. In Gulab Chand Vs.

State of M.P. (supra) the recovery evidence was unexceptionable and recovery was made on the next day i.e. in close proximity to the murder. Ofcourse if it would have been established that he was one of the robbers then he would also have been convicted for murder because murder was part of the same transaction of the robbery. There is also a doubt as to whether this metal drum was lying in the house of Damodar as there is no clear and sufficient evidence to show that the vessel was in the house owned by Damodar. We cannot lose sight of the fact that Damodar had never worked in the house of Dr. Wagh and was not a person who was himself familiar with the articles and occupants of the house. There is a possibility that he may only be party of the conspiracy of recovery without being aware that murder would be committed when the robbery was actually being committed. The watchman of the society has unfortunately not supported the prosecution, though in the identification parade evidence he did identify Damodar. In the circumstances, there is lurking doubt in our mind about the sufficiency of the circumstance of recovery against the Damodar particularly as no amount was found from his person and that there is a serious discrepancy in the evidence relating to

finding of four railway tickets from his trouser, the amount found and the place of such recovery.

20. As regards the third circumstance that Demodar was seen alongwith Kailash as stated hereinabove, the evidence in this regard is that of P.W.3 Sunil Bachnuprasad Verma. As already discussed that Sunil Bachnuprasad Verma talks about seeing Damodar on the date of the incident, he had however, not able to identify Damodar who was his own co worker in the identification parade. This lacuna in the identification parade has been confirmed by the Special Executive Magistrate. As a result, we are giving benefit of doubt to accused No.2 Damodar and therefore acquit him.

21. The net result is that the appeal succeeds partly. The conviction and sentence imposed upon accused No.1 Kailash Upendra Giri is confirmed and accused No.2 Damodar Laxmidhar Sahu is acquitted of all the charges against him. The impugned Judgment and order stands modified accordingly. Fine, if any, paid by accused No.2 may be refunded to him. There will be no change in the order under Section 235 of the Criminal Procedure Code relating to return of property.

**(R.M. LODHA, J. )**

**(R.S. MOHITE, J.)**